No. 72-402

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

UNITED STATES OF AMERICA, APPELLANT

v.

GENERAL DYNAMICS CORPORATION, THE UNITED ELECTRIC COAL COMPANIES, and FREEMAN COAL MINING CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF IN SUPPORT OF THE MOTION TO AFFIRM

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The government's brief in opposition to the Motion to Affirm serves only to demonstrate that the decision below should be summarily affirmed. Discussing but a single case, the government devotes its brief to quarreling with the District Court over the conclusions which it reached on the basis of abundant record evidence. The 7,500 pages of testimony and 10,000 pages of exhibits which formed the substantial evidence upon which the decision below rests can-

not be swept aside, however, by a few fragments of evidence from this massive record. Such an effort to short-circuit the trial record ignores that the question on review in Section 7 cases, as in all other cases, is whether the decision of the trial court is supported by substantial evidence.

At the outset, the government seeks to avoid the District Court's unmistakable holding that the longstanding affiliation of United Electric and Freeman would not violate Section 7 even if the government's product and geographic market definitions were accepted. (App. 59a-60a, 65a-66a.) The government asserts that one of the court's findings in this regard was addressed solely to the question of relief. (Govt. Brief, p. 2.) This argument rests on the government's representation that the "full statement" of the District Court was as follows: "nor would divestiture benefit competition even if this court were to accept the Government's unrealistic product and geographic market definitions." This was hardly the District Court's *full* statement. To the contrary, the court's "full statement" was as follows: "Under these circumstances, continuation of the affiliation between United Electric and Freeman *is not adverse to competition*, nor would divestiture benefit competition even were this court to accept the Government's unrealistic product and geographic definitions." (App. 65a-66a, emphasis supplied.)

The government's attack on a second holding by the District Court that it would have found no substantial lessening of competition if it had accepted the government's geographic markets (App. 59a-60a) rests on a similarly heavy-handed editing, as well as a misreading, of the trial court opinion. The court's own discussion of the likely competitive effects of the combination (App. 60a-64a) makes clear that *none* of its findings with respect to concentration, competitive overlap, types of mining, types of coal, Commonwealth Edison, United Electric's inability to serve Chicago, United Electric's "singularly unpromising" coal reserve prospects and the like were dependent upon the

geographic markets chosen by the court or would have been different had the markets urged by the government been adopted.

Indeed, the government does not and cannot point to a single specific finding in the court's entire opinion that hinged upon resolution of this issue. As to the trial court's finding (unedited here) that "[t]he Freight Rate Districts in which the mines and reserves of United Electric are located serve separate and distinct markets from those in which the mines of Freeman are located" (App. 62a.), this was not addressed to the subsidiary *legal* question of the appropriate "section of the country" but to what the *facts* of record showed with respect to the marketing of coal. Whether it is technically correct to say that United Electric and Freeman serve separate markets within a "section of the country" or to say that they serve separate "sections of the country," there can be no escaping these hard facts showing that "an independent United Electric would not and could not compete with Freeman to any substantial degree." (App. 61a.)

Neither the government's editing nor its arguments can obscure the fact that the subsidiary questions of market definition did not control the District Court's ultimate conclusion that the challenged combination does not violate Section 7. Since these subsidiary questions were neither material to the decision below nor involved any break with precedent, they clearly raise no substantial questions requiring review by this Court.

Nor can the government, by grasping at evidentiary fragments in a record of immense proportions, escape the substantial evidentiary support for the District Court's conclusion that "virtually all of the economically mineable strip reserves of United Electric have been sold under long-term contracts, and United Electric has neither the possibility of acquiring more nor the ability to develop deep coal reserves." (App. 65a.) While the government pretends that the appellees "apparently" rely "solely" upon the testimony of Mr. Camicia with respect to United Electric's lack of any

deep mining potential (Govt. Brief, p. 7), and that of Mr. Organ with respect to the non-availability of strip reserves (*id.* p. 3), appellees, of course, do no such thing. Like the District Court, appellees rely on all of the evidence on these issues provided by a host of witnesses and exhibits.

Just how overwhelming this evidence is may be seen by contrasting the arguments in the government's present brief with the testimony of the only witness called by the government to testify at trial concerning these issues, Mr. Hopper of Ayrshire Collieries:

1. While the government would have this Court believe that there is an abundance of strip reserves available to United Electric (Govt. Brief, p. 5), government witness Hopper verified that "it is common knowledge within the coal industry that strip reserves available for acquisition are in extremely short supply. . . ." (Hopper Tr. 1892.)[1]

2. Though the government chides United Electric for failing to acquire the Belle Rive and Edison properties and claims that United Electric's post-merger management was generally lax in its reserve acquisition efforts (Govt. Brief, p. 4), its witness Hopper testified that his own company

[1] The Court should not be misled by the government's citation to the data of the Illinois State Geological Survey. Mr. Simon, the Principal Geologist of the Illinois State Geological Survey, testified at trial that, by itself, this data "certainly couldn't be used to support" the government's contention that United Electric will be able to acquire additional economically mineable strip reserves in Illinois to continue its mining operations beyond the time when its existing strip reserves are exhausted. (Simon Tr. 62-63; see also Simon Tr. 45.) Indeed, even the government's own economist conceded in the closing days of the trial that the "record indicates that high quality strip reserves are relatively scarce in Illinois." (Folsom Tr. 2476.) Summing up the trial record on this issue, the District Court stated that "[e]vidence was presented at trial by experts, by state officials, by industry witnesses and by the Government itself indicating that economically mineable strip reserves that would permit United Electric to continue operations beyond the life of its present mines are not available." (App. 63a.)

and others had passed up these same properties as having no potential (Hopper Tr. 1881, 1885) and that United Electric's exploration activities in these areas were "a clear indication that they were attempting to find and presumably acquire additional reserves." (*Id.* 1886.)[2]

3. While the government would like to dismiss the expert report and judgment of the mining engineering firm of Paul Weir Company with respect to the lack of competitive potential of the Industry Field,[3] the lack of available midwest strip reserves and United Electric's inability to undertake deep mining (DX 87) as a "litigation report" prepared by a "litigation consultant" (Govt. Brief, pp. 5-6), government witness Hopper acknowledged that the "Paul Weir Company is one of the world's most widely known and highly regarded mining engineering companies" and went on to vouch for its "very fine reputation." (Hopper Tr. 1894.)

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[2] The record is totally at odds with the government's intimation that United Electric was somehow held back in its reserve acquisition efforts. Mr. Camicia testified that while he was president of United Electric he had a "blank check" to acquire whatever strippable reserves could possibly be found. (Camicia Tr. 1399.) Similarly, Mr. Inman, who had been United Electric's Vice President of Operations, stated that he had had an "open book" with respect to the expenditure of funds on the acquisition of coal reserves (Inman Dep. 205; see also Morris Tr. 536.) The wide latitude which United Electric's personnel were given in their search for additional strip reserves was emphasized by Mr. Camicia at trial: "I didn't even put any reservations on it. I just said find some coal that could be stripped, and then I would decide whether it was worth buying or not. Anything that can be stripped, just so it is black." (Camicia Tr. 1440.)

[3] As the government well knows, the Paul Weir testimony fully detailed the reasons why the 1959 hopes that competitive conditions would in time permit the profitable development of the Industry Field were never realized. Mr. Weir explained that because of the unfavorable profit experience at other mines in the area, changes in the competitive situation in the coal fields and other factors, "the picture is still dark for development of Industry." (Weir Dep. 138-39.) "The coal industry today is not the same coal industry that we had ten years ago, and we have learned certain things about mining in this area, and these cannot help but be reflected in our thinking. . . ." (*Id.* 144.)

4. The government criticizes Mr. Camicia for his belief that Ayrshire had made a mistake in entering deep mining and suggests that United Electric would have no trouble doing so. (Govt. Brief, p. 7.) Government witness Hopper, however, testified that if Ayrshire had it to do over again it would "absolutely not" open its Thunderbird deep mine (Hopper Tr. 1881) and that United Electric "would be in a very awkward position" were it to attempt underground mining. (*Id.* Tr. 1903.)

5. Finally, the government's rose-colored vision of what the future would hold for an independent United Electric also stands in sharp contrast to the views of its witness Hopper. When asked during cross examination whether, in his professional opinion, it would be a mistake to force a company in United Electric's condition to operate independently in the belief that strip reserves were available which would enable the company to remain in business in the future at its current levels of production, Mr. Hopper responded: "Well, it would be my opinion that they would be in a very poor position to live up to the situation that they had been placed in, because I very seriously doubt that they could acquire additional reserves to that extent to maintain that sort of production over a prolonged period of time." (Hopper Tr. 1902.) In view of such testimony *from the government's own witness,* it is not surprising (let alone reversible error) that the District Court rejected the suggestion that it resurrect an independent United Electric whose future prospects were tied to nothing more than the unschooled speculations of government counsel below—repeated here (Govt. Brief, p. 3)—that "what is not economically viable today may become so tomorrow." The District Court quite properly preferred the considered opinions of geologists, mining engineers, experts, state officials, coal consumers, and coal producers who had spent their life-

time in the coal business to such *ipse dixit* forecasts by attorneys whose experience in the field began with this litigation.

The testimony of the government's only witness on these issues was thus squarely against it, and corroborated the record evidence introduced by defendants on these same issues from dozens of witnesses and scores of exhibits. There can be no doubt then that the trial court's opinion is supported by substantial evidence and would not be reversed upon a plenary review.

Try as it may, there is simply no way the government can overcome the fact that the decision below turned on the resolution of a host of complex and disputed *evidentiary* issues peculiarly within the province of the trier of fact. Since the decision below was clearly correct, involved no departure from existing Section 7 precedent, and presents no legal issues that were either material or substantial, the decision below should be summarily affirmed.

Respectfully submitted,

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